* **HIGH COURT OF DELHI : NEW DELHI**

\+ **Writ Petition (C) No. 839 of 2007**

Judgment reserved on: May 9, 2007

% Judgment delivered on: May 16, 2007

M/s Nokia Corporation
C/o S.R. Batliboi & Co.
2nd Floor, The Capital Court
LSC, Phase-III, Olof Plame Marg
Munirka, New Delhi
through its Authorised Signatory ...Petitioner

Through Mr. N. Venkataraman, Sr. Advocate
with Mr. Peeyoosh Kalra, Advocate

Versus

1. Director of Income-tax (International Taxation)
415, Drum Shaped Building
I.P. Estate, New Delhi

2. Assistant Director of Income Tax
Circle-2(1), International Taxation
414, Drum Shaped Building
I.P. Estate, New Delhi ...Respondents

Through Mr. R.D. Jolly, Advocate

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

MADAN B. LOKUR, J.

The Petitioner is a company incorporated under the laws of Finland and is engaged in the business of supplying advanced telecommunication systems and equipment for use in fixed and mobile phone networks. According to the Petitioner, it does not have any permanent establishment in India and, therefore, being a tax resident of Finland and governed by the provisions of India-Finland Double Taxation Avoidance Agreement, the income derived by the Petitioner from supply of telecommunication equipments to Indian telecom operators qualifies as "business profits" and no portion thereof is taxable in India. Accordingly, in respect of the assessment year 2003-04, the Petitioner filed a nil return of income.

2. Unfortunately for the Petitioner, the Assessing Officer did not agree with it and, therefore, assessed its income under Section 143(3) of the Income Tax Act, 1961 (the Act) and raised a demand of Rs.37.47 crores by way of tax and Rs.14.05 crores by way of interest

under Section 243B of the Act. The assessment order was, of course, passed on the basis that the Petitioner had a permanent establishment in India and, therefore, the profit arising to it from the supply of equipment to Indian customers is taxable in India.

3. Feeling aggrieved by the order passed by the Assessing Officer, the Petitioner preferred an appeal which is pending before the Commissioner of Income Tax (Appeals) [CIT (A)]. Before the appellate authority, the Petitioner asked for a stay of deposit of the tax and interest and it seems that the Petitioner was asked to indicate, according to it, the amount due by way of tax. The Petitioner relied upon a judgment delivered by the Special Bench of the Income Tax Appellate Tribunal (the Tribunal) dated 22nd June, 2005 in the case of the Petitioner itself and pertaining to the assessment years 1997-98 and 1998-99, and responded by saying that if the judgment is implemented by the Revenue, the liability of the Petitioner would be about Rs.4.86 crores for the assessment year 2003-04. On this basis given by the Petitioner, it was asked to deposit an amount of Rs.4.86 crores by the Revenue.

4. Feeling aggrieved by this demand, the Petitioner preferred

this writ petition praying for a stay of the demand.

5. As mentioned above, there is a decision of the Special Bench of the Tribunal in the case of the Petitioner itself for the assessment years 1997-98 and 1998-99. According to the Petitioner, this decision should be applied across the board for all the assessment years from 1997-98 to 2003-04 and if that is done, then the Petitioner would in fact be entitled to a refund of tax on the basis of the cumulative demands and deposits for assessment years 1997-98 till assessment year 2003-04. Therefore, the contention of the Petitioner is that if it is asked to deposit Rs.4.86 crores for the assessment year 2003-04, it will be casting an unnecessary burden on the Petitioner and would mean that the Revenue is not looking at the entire picture for all these assessment years cumulatively, but for one assessment year at a time which, according to the Petitioner, it should not do.

6. It appears that the Revenue has challenged the order dated 22nd June, 2005 passed by the Special Bench of the Tribunal by filing an appeal under Section 260A of the Act but we are told that this appeal has not yet been listed for preliminary hearing and in any case there is

no stay of the order dated 22nd June, 2005 passed by the Special Bench of the Tribunal.

7. It was submitted that across the board implementation has in fact been accepted in principle by the Tribunal before whom appeals filed by the Petitioner in respect of assessment years 1999-2000, 2000-01 and 2001-02 (three assessment years) are pending. With regard to these three assessment years, the Petitioner had filed an application for stay before the Tribunal in respect of an outstanding demand of Rs.15.74 crores. Reliance was placed by the Petitioner on the pendency of its appeal before the Special Bench of the Tribunal. The Tribunal took note of this fact and against a demand of Rs.15.74 crores, it directed the Petitioner by an interim order dated 3rd June, 2005 to pay Rs.50 lakhs for three months, that is, June, July and August, 2005 (making a total of Rs.1.5 crores). The Tribunal also took note of the fact that the CIT (A) had differed with his predecessor in so far as levy of interest was concerned and that the Petitioner had also paid a sufficient amount towards the tax liability.

8. After the interim order dated 3rd June, 2005 was passed by

the Tribunal, the Special Bench of the Tribunal decided the appeals of the Petitioner on 22nd June, 2005 in respect of the assessment years 1997-98 and 1998-99. Consequently, the Petitioner moved an application for modification of the order dated 3rd June, 2005. By an order dated 29th July, 2005, the Tribunal noted that the Petitioner seems to have paid excess tax of about Rs.16.90 crores (if the order of the Special Bench is implemented) and that the Petitioner had also paid Rs.50 lakhs in terms of the order dated 3rd June, 2005 and so, relying on the decision of the Special Bench, the Tribunal modified its earlier order dated 3rd June, 2005 and relieved the Petitioner of its requirement to pay the balance amount of Rs.1 crore in terms of the order dated 3rd June, 2005. In other words, against a liability of Rs.15.74 crores, the Tribunal was satisfied with the Petitioner's deposit of Rs.50 lakhs primarily in view of the applicability of the decision of the Special Bench.

9. Learned counsel for the Petitioner mentioned these details pertaining to the three assessment years to impress upon us the fact that even the Tribunal had felt bound by the order passed by the Special Bench and, therefore, it had granted interim relief to the Petitioner. It

was submitted that on this very basis, the CIT (A) also ought to have felt bound by the order passed by the Special Bench and ought not to have required the Petitioner to deposit a sum of Rs.4.86 crores by way of an interim order.

10. Learned counsel for the Revenue, as expected, vehemently opposed the writ petition and relied upon its various affidavits. It was categorically asserted that no refund is due to the Petitioner and that the figure of Rs.4.86 crores was arrived at only because the Petitioner itself admitted that this was its tax liability for the assessment year 2003-04. Accordingly, it was submitted that there is no question of granting any further relief, let alone any stay in favour of the Petitioner. With regard to the calculations on an across the board basis, learned counsel submitted that each assessment year is an independent assessment year and what this Court is concerned with is the assessment year 2003-04 and in so far as that assessment year is concerned, there is an admitted liability of the Petitioner to pay Rs.4.86 crores by way of tax. The general proposition that the Petitioner would be entitled to a refund (if an adjustment is made across the board on the basis of the decision of

the Special Bench) was not adverted to by the Revenue, although it was submitted that the order passed by the Special Bench was not final in the sense that an appeal had been filed under Section 260A of the Act in this Court. It was further submitted by learned counsel for the Revenue that as things stand today, there is factually no refund due to the Petitioner.

11. We may mention by way of completion of facts that for the assessment year 2002-03 (the only other remaining assessment year), an appeal filed by the Petitioner is pending before the CIT (A). The Petitioner has also asked for a stay of deposit in that appeal but it appears that no order has as yet been passed by the CIT (A), one way or the other.

12. The Supreme Court stated, many years ago, in ***Union of India v. Kamlakshi Finance Corporation Ltd., 1991 (55) ELT 433*** as follows:

> "The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities.

It was further observed by the Supreme Court that if the order of an appellate authority is the subject matter of further appeal, that cannot furnish any ground for not following it, unless its operation has been suspended by a competent Court. The Supreme Court went on to say that if this healthy rule is not followed, the result will not only be undue harassment to assessees but chaos in the administration of tax laws.

13. In ***Commissioner of Income Tax, Bhopal v. Ralson Industries Ltd., (2007) 2 SCC 326***, the Supreme Court held:-

> "When an order is passed by a higher authority, the lower authority is bound thereby keeping in view the principles of judicial discipline."

The Supreme Court drew support from ***Bhopal Sugar Industries Ltd. v. ITO, (1960) 40 ITR 618*** wherein it was held:

> "If a subordinate tribunal refuses to carry out directions given to it by a superior tribunal in the exercise of its appellate powers, the result will be chaos in the administration of justice....."

It was further observed in ***Bhopal Sugar Industries***:

> "The Judicial Commissioner was not sitting in appeal over the Tribunal and we do not think that in the circumstances of this case it was open to him to say that the order of the Tribunal was wrong and, therefore, there was no injustice in

> disregarding that order. As we have said earlier such a view is destructive of one of the basic principles of administration of justice."

14. Similarly, in ***Triveni Chemicals v. Union of India & Anr., (2007) 2 SCC 503***, the Supreme Court reiterated the principle that adjudicating authorities are bound by the doctrine of judicial discipline.

15. Following the view laid down by the Supreme Court, we are faced with a situation where there is admittedly an order passed by the Special Bench of the Tribunal which considerably reduces the tax liability of the Petitioner than what had been determined by the Assessing Officer. That there would be a reduction in the liability is evident from the decision given by the Tribunal in its order dated 29th July, 2005 in respect of the assessment years 1999-2000 to 2001-02. All that the Tribunal did in that order was to follow the tenets of judicial discipline as laid down by the Supreme Court and on that basis grant relief to the Petitioner. We are of the view that if the Tribunal can follow its earlier order passed by the Special Bench, in keeping with the high standards of judicial discipline, then there is absolutely no reason why a subordinate authority such as the CIT (A) should feel hesitant to

follow the order of the Special Bench and give relief to the Petitioner.

16. What has apparently come in the way of the CIT (A) is the impression carried by him (and which has been articulated by learned counsel for the Revenue) that each assessment year has to be treated as independent of the other and, therefore, the CIT (A) took the assessment year 2003-04 by itself and applying the decision of the Special Bench of the Tribunal granted relief to the Petitioner by requiring a deposit of only Rs.4.86 crores. This is, of course, one possible way of looking at the issue. However, it has to be remembered that the State is bound to be fair to those with whom it has to deal with, and to the extent possible, it must avoid any harassment to the assessee public without causing any loss to the exchequer. Therefore, if one looks at the matter in a broader perspective (and there is no reason why we should not), then it would be necessary to take into account the tax liability of the Petitioner for the entire period in respect of which the dispute is still alive, that is to say from the assessment year 1997-98 till the assessment year 2003-04. If this is done and an across the board review is taken of the tax liability of the Petitioner as well as the amounts paid by the Petitioner, as has actually been done by the Tribunal in its order dated 29th July, 2005,

then the Petitioner would be entitled to a refund. On the other hand, if each year is taken separately, then of course there would be a liability against the Petitioner for the assessment year 2003-04 – but such a narrow or constricted view does not commend itself to us since it would unnecessarily deprive an assessee of good money due to it from the Revenue. Looked at in this larger perspective, we are of the view that the Petitioner would be entitled to the relief prayed for since it has, quite clearly, paid more than the amount that is due if the order passed by the Special Bench is implemented.

17. In arriving at this conclusion, we have also taken note of the fact that the order of the Special Bench has not been stayed and is still operative and has in fact been given effect to by the Tribunal itself in its order dated 29th July, 2005. Consequently, we issue a writ of mandamus and stay the requirement of the Petitioner having to deposit Rs.4.86 crores till its appeal for the assessment year 2003-04 is heard by the CIT (A). This would necessarily imply that the CIT (A) should hear the appeal of the Petitioner for the assessment year 2003-04 without insisting on any deposit.

18. The writ petition is allowed. All pending interim applications are disposed of. No costs.

Madan B. Lokur, J

May 16, 2007
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V.B. Gupta, J

Certified that the corrected copy of the judgment has been transmitted in the main Server.